

# PROPOSED AMENDMENT OF SECTIONS 11386 AND 11303

## INITIAL STATEMENT OF REASONS

**Background:** California Government Code Sections 66641.5 through 66641.9 authorize the Commission to impose administrative civil penalties of between \$10 and \$1000 per day for each day that a violation occurs or persists up to a total of \$20,000 for each separate violation. In 1993, in order to reduce the time and expense of resolving alleged violations, the Commission adopted Regulation Section 11386 which sets out a schedule of standardized civil penalties for specified categories of alleged violations that are fully corrected within the specified period of time. Recently, the Commission determined that several weaknesses existed within the current regulatory framework regarding standardized civil penalties. The following problems were identified.

### **Problems:**

1. Some alleged violators are able to absorb the relatively low cost of standardized penalties and, as a result, can continuously violate BCDC laws and policies.
2. Under the existing penalty structure, a violator can repeat the same small violation in perpetuity without ever being assessed any civil penalty as long as the violation is technically resolved within 35 days each time.
3. Some of the standardized fine amounts do not match the relative severity of the type of violation.
4. Daily fine amounts differ for similar violations.
5. The threshold requirements used by the Executive Director to determine when the standardized fine process is appropriate are unclear.
6. The Commission is forced to use the standardized fine process even when a violator has not proceeded in good faith.
7. There is no standard time limit defining when the opportunity to use standardized fines ceases.
8. Violations of permit conditions not specifically named but similar to those listed in the existing standardized fine section cannot be resolved using standardized fines.
9. The process for appealing both the time limit for resolution using standardized penalties and the standardized penalty amount is unclear.

10. Under the existing language, alleged violators are not specifically informed of their right to a formal enforcement hearing.
11. Some of the existing language is unclear or incorrect.
12. Under the existing language of Section 11386 it is unclear whether alleged violations covered by Section 11386 can be referred to the Attorney General's Office along with other alleged violations committed by the same violator.

**Proposal:** To solve these problems, the Commission proposes to amend its regulations to:

1. Double fines for violators who have previously paid a standardized civil penalty within the previous five years (§11386(f));
2. Create an immediate per diem penalty schedule for violations that have previously been corrected within the 35-day "grace" period (§11386(g));
3. Rationalize the standardized fine amounts by increasing those associated with activities that cannot be approved and decreasing those associated with activities that can be approved;
4. Make all per diem fine amounts equal;
5. Clarify the existing threshold determinations made by the Executive Director as to when the standardized process is appropriate (§11386(a));
6. Allow the Executive Director to terminate the opportunity to use standardized fines after thirty-five days of providing notice if a good-faith effort has not been made to resolve the violation (§11386(h));
7. Create a standard time limit of one hundred and twenty-five days for resolving violations through standardized fines (§11386(h));
8. Include all violations of permit conditions within the existing standardized fine section;
9. Clarify the process for appealing both the time limit for resolution using standardized penalties and the standardized penalty amount (§11386(i) and (j));
10. Specifically inform an alleged violator of their right to a formal enforcement hearing (§11386(k));
11. Clarify and correct some of the existing language; and
12. Specifically state that referrals to the Attorney General's Office may include all outstanding violations, including those listed in Section 11386.

**Rationale:**

1. A person who violates BCDC laws and policies after already having paid a standardized fine as part of a prior proceeding demonstrates that the initial standardized fine amount provided an insufficient incentive to prevent illegal activity. Doubling this amount for repeat violators would strengthen the incentive to comply.
2. A per diem penalty for violations that had previously been corrected within the 35-day “grace” period would create a way to penalize repetitive, short-term violations through the standardized fine structure. Because the new regulation applies only to repeated violations, the initial 35-day “grace” period would still apply to the initial violation.
3. Changing the standardized fine amounts to be internally consistent would provide a more rational penalty structure. For example, under the suggested changes, activities that could be authorized would be penalized less severely than activities that could not be authorized.
4. Making all per diem fine amounts equal at one hundred dollars per day allows for uniform application and establishes an amount easily calculated by alleged violators.
5. Clarifying the threshold determinations made by the Executive Director by using more explicit language and subsection headings would help alleged violators better understand their rights and obligations and would provide the Executive Director with clearer guidance on what findings must be made.
6. Allowing the Executive Director to terminate the opportunity to use standardized fines after thirty-five days of providing notice provides the Commission with the ability to go directly to a formal enforcement proceeding when a violator has not acted in good faith while still preserving the 35-day “grace” period.
7. By establishing a standard time limit of one hundred and twenty-five days for resolving violations through standardized fines, alleged violators will be provided with a consistent and predictable time frame for resolution using the standardized process.
8. Including all violations of permit conditions within the language of Section 11386 will allow both the violator and BCDC to use the more efficient standardized process when appropriate.
9. Clarifying the process for appealing both the time limit for resolution using standardized penalties and the standardized penalty amount will make it easier for an alleged violator to determine their rights and obligations.
10. Specifically informing an alleged violator of his or her right to a formal enforcement hearing will remove any uncertainty as to the options available to the alleged violator.
11. Clarifying the existing language eliminates uncertainty for both the Commission and those affected by the regulation.

12. Specifically stating that referrals to the Attorney General's Office may include all outstanding violations, including those listed in Section 11386, clarifies any ambiguity.

**Alternatives:**

1. Greater fines could be applied for repeat violators.
2. The Commission could choose any of three options for dealing with repetitive, short-term violations. First, the Commission could have repealed the 35-day "grace" period altogether. This, however, would be more punitive for those believed to be in violation. Second, the Commission could give the Executive Director the ability to determine that a particular violation is subject to an immediate fine with no "grace" period. This option increases the discretion of the Executive Director. Third, categories of violations subject to an immediate fine could be described. This method is cumbersome and requires that the regulation contemplate every possible type of violation that is repetitive and of short duration and does not provide a person subject to the regulation with the certainty that the proposed language achieves.
3. There is no alternative to changing the standardized fine amounts to be internally consistent.
4. Per diem fine amounts could be changed to whatever amounts the Commission finds effective. \$100 per day was chosen as the most appropriate amount based on the experience of the Commission and staff.
5. There is no alternative to clarifying the threshold determinations made by the Executive Director.
6. The Commission could allow the Executive Director to eliminate the option to use standardized fines immediately or at whatever point the Executive Director determines to be appropriate. However, the proposed language preserves at least the 35-day "grace" period and gives the person believed to be in violation sufficient notice that the opportunity to use standardized fines will be terminated.
7. The Commission could choose any time limit as the standard for beginning formal proceedings but a limit of 125 days (30 days from the last existing limit) corresponds best with the existing schedule and reflects the best judgment of the Commission and staff as to the appropriate standard time limit.
8. There is no alternative way to incorporate all permit violations into the standardized fine section.
9. There is no alternative way to clarify an alleged violator's right to appeal both the fine amount and the time after which formal proceedings will begin.
10. There is no alternative way to specifically inform an alleged violator of their right to an appeal.

11. There is no alternative to clarifying the existing language.
12. There is no alternative way to specifically provide that all outstanding violations may be included in a referral to the Attorney General's Office.

**Alternatives:** The Commission must determine that no alternative it considers would be more effective in carrying out the purpose for which the regulation is proposed or would be effective and less burdensome to affected private persons than the proposed regulation.

**No significant adverse economic impact on business:** The Commission does not believe that the regulation would have a significant adverse economic impact on business because the proposed regulation only affects penalty amounts for violations of existing requirements. The proposed regulation does not create any new policy or impose any new requirement on business.

**Duplication:** The Commission has determined that the proposed regulation avoids duplication with other state and federal law.